IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0136

IN THE MATTER OF:

S.F., JR.,

A Youth.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah Kim Christopher, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEY FOR YOUTH
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MITCH YOUNG
Lake County Attorney
106 Fourth Avenue East
Polson, MT 59860

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Where the evidence showed that Appellant did not enter the house, did not take the keys, and did not take the computer, did the district court err in denying Appellant's motion for a directed verdict [motion to dismiss for insufficient evidence] on the charge of felony theft?

2. Did the district court also err by imposing a restitution obligation on Appellant when he did not cause the damage to the van?

STATEMENT OF THE CASE AND FACTS

The State filed a petition in the Twentieth Judicial District Court, Lake County alleging that S.F. was a delinquent youth and a serious juvenile offender. Ultimately, S.F. admitted to Count I, felony burglary, wherein he entered or remained unlawfully in Amanda James's home with the intent to commit an offense therein. He also admitted to Count IV, misdemeanor unauthorized use of a motor vehicle, wherein he purposely or knowingly obtained or exerted unauthorized control of Edward Longin's property valuing over $1,000. (D.C. Doc. 21; 12/10/2009 Tr. (Tr.) at 10.)

A bench hearing was held regarding Count II, felony burglary, and Count III, felony theft. It was alleged that for Count II, S.F. entered or remained unlawfully in the Cory Elliot (Elliot) residence with the purpose to commit an offense, and for Count III, felony theft, he knowingly or purposely obtained or

exerted unauthorized control over Elliot property with the purpose to deprive Elliot of the property. (D.C. Doc. 21; Tr. at 10.)

Elliot, the owner of the van that was taken and whose daughter owned the laptop that was also taken, testified that he woke up on May 23, 2009, to a telephone call from his mother-in-law. (Tr. at 11.) Elliot's mother-in-law had heard over the scanner that the family's purple van had been in a wreck. She was calling to make sure the family was okay. (Tr. at 11.)

Elliot knew nothing about his van having been wrecked, so he immediately looked outside and discovered that his van was missing. He later went with an officer to identify the van that had been crashed into a tree on another person's property. (Tr. at 12-16.) Elliot's daughter also discovered that her laptop was missing from the home. (Tr. at 17.) In searching around the house, Elliot and his family noted that the back sliding door was open about an inch. Elliot testified that they normally place a stick into the sliding door, but they had not done so the previous night nor could he recall whether they had locked the door. (Tr. at 18.)

G.S. and S.F. were friends. (Tr. at 21.) G.S. testified under oath that on the night of May 23, 2009, he was drinking. He and S.F. were walking around and then went to the Elliot home. G.S. entered the Elliot home through the unlocked sliding glass door. S.F. remained outside. G.S. took the keys to the van and also took the laptop which was located near the keys. G.S. told S.F. to meet him at the

end of the block. G.S. then started the van, drove to the end of the block, picked up S.F., and then drove away. G.S. drove most of the time throughout the night, while S.F. drove very little around Kerr Dam. G.S. fell asleep at the wheel and wrecked the van into the tree. (Tr. at 22-26.)

Over a hearsay objection, J.B. testified that he and G.S. are friends; that G.S. had told him that S.F. had entered the Elliot home with G.S.; that G.S. stole the van; that G.S. stole the laptop; that G.S. drove the van around; that G.S. had been drinking; and that G.S. had passed out and woke up to S.F. laying next to him in the van. (Tr. at 27-30.) G.S. gave J.B. the laptop, which J.B. then gave to the school resource officer. (Tr. at 31.)

S.F.'s counsel then made the following motion.

> MR. ESCHENBACHER: Your Honor, I'm going to ask for a directed verdict on the two counts. The only testimony that exists in this matter is [G.S.] saying that . . . [S.F.] did not enter the house and that he was only riding around with him. He may have driven it, but there's no evidence showing that he was intending to prevent return of the property to the rightful owner. He may have been guilty of unauthorized use of a motor vehicle, but there was certainly no intent to deprive the Elliotts of the property. That seems to have been done by [G.S.].
>
> The second part of the reason why I'd like to ask for the two counts to be dismissed, because under the State's theory [G.S.] and [S.F.] are co-conspirators. Co-conspirator's testimony is to be viewed with distrust. And at best [G.S.] has said that [G.S.] [sic] didn't enter the house. At worse he said he may have driven the van. But there's no evidence other than that, possibly with a possible inconsistent statement, which was never fully examined and giving [G.S.] a chance to correct or amend or clarify.

So for that reason I also ask [J.B.'s] statements be stricken from the record for consideration. So I think in the particular case, Your Honor, these two counts cannot be proved beyond a reasonable doubt.

THE COURT: Mr. Allen?

MR. ALLEN: Your Honor the State has presented testimony that Elliott's van was stolen. [G.S.] has presented testimony about how that was stolen, including the youth's involvement in that.

Significantly [G.S.] told [J.B.] the details of that event including that [S.F.], the youth, was involved, that the youth went inside the house and that the youth was with [G.S.] while they were out joyriding.

MR. ESCHENBACHER: I would remind the Court, Your Honor, that [G.S.] was under oath today when he said he [S.F.] did not enter the house.

THE COURT: The defendant's motion with regard to Count II is granted. There is a failure of proof with regard to the burglary. I can't, though, go the next step with regard to the theft. So if you wish to proceed with the defendant's case with regard to Count III you may do so.

. . .

MR. ESCHENBACHER: Your Honor, we have no witnesses.

THE COURT: Very well. Then that completes the introduction of evidence in this matter. The Court does find that there is sufficient evidence to support the theft. There was the testimony with regard to the van, the damage to the van that exceeds the amount of the felony amount. There is nothing to controvert the idea that the youth was in fact with [G.S.], and there's nothing to controvert the fact that he took part in driving the vehicle that was then ultimately damaged.
That being the case, he having been present, involved and having no other reason for his involvement, the Court finds that he has equal responsibility for the damage that was created. He allegedly met the other co-conspirator at the end of the block and the Court is not holding him accountable for the burglary of obtaining the keys but I

> have nothing in the record to show anything other than he involved himself in the actual theft that involved the damage to the van. So the defendant is found guilty of theft, a felony, Count III. I assume the parties need additional time with regard to where we are going with disposition in this matter?

(Tr. at 33-34.) S.F. was committed to the Department of Correction with placement at Pine Hills Correctional Facility until age eighteen (18) or sooner released. S.F. was also ordered to pay restitution, as follows:

> The Youth is ordered to pay restitution in the amount of $3,459.31 on Count III and $30 on Count IV. The Youth shall be jointly and severally liable for restitution on Count III, with his co-defendant [G.S.]. However the Court stays execution of the order to pay restitution on Count III, pending the Youth's appeal.

(D.C. Doc. 28.) Counsel for S.F. agreed with ordering those amounts, but requested that the two restitution amounts be separated given that S.F. was going to appeal the district court's denial of his motion to dismiss [motion to dismiss for insufficient evidence]. Counsel also requested that the restitution be stayed pending S.F.'s appeal. (D.C. Doc. 28; 1/14/2010 Tr. at 2-4.)

S.F. filed a timely notice of appeal. (D.C. Doc. 32.)

SUMMARY OF THE ARGUMENT

The State did not provide sufficient evidence that S.F. had actually entered the Elliot home, let alone, that he had taken anything from the Elliot home. Therefore, the district court erred in denying S.F.'s motion for a directed verdict

[motion to dismiss for insufficient evidence]. The district court also erred in ordering S.F. to pay restitution.

STANDARD OF REVIEW

This Court clarified that motions for directed verdict are more appropriately entitled motions to dismiss for insufficient evidence. *State v. Farmer*, 2008 MT 354, ¶ 6, 346 Mont. 335, 195 P.3d 800. S.F.'s motion for directed verdict should be considered by this Court as a motion to dismiss for insufficient evidence, the denial of which is reviewed *de novo*. *Farmer*, ¶ 6 (*citing State v. McWilliams*, 2008 MT 59, ¶¶ 36-37, 341 Mont. 517, 178 P.3d 121, wherein motions of directed verdict are equated to motions to dismiss for insufficient evidence because of the common denominator that the prosecution failed, as a matter of law, to prove the charges beyond a reasonable doubt, that the prosecution's evidence was insufficient).

A district court properly grants a motion for a directed verdict only when no evidence exists upon which a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt, when viewing the evidence in a light most favorable to the prosecution. *State v. Marler*, 2008 MT 13, ¶ 20, 341 Mont. 120, 176 P.3d 1010 (*citing State v. Swann*, 2007 MT 126, ¶ 16, 337 Mont. 326, 160 P.3d 511).

ARGUMENT

I. INSUFFICIENT EVIDENCE EXISTED TO CONVICT S.F. OF FELONY THEFT.

Montana Law provides: "When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant." Mont. Code Ann. § 46-16-403.

At the close of the State's case, S.F. moved for a directed verdict [motion to dismiss for insufficient evidence]. (Tr. at 32.) S.F. argued that the State failed to provide sufficient evidence to prove that he had committed the offense of felony theft. (Tr. at 32.)

The State alleged that S.F. violated Mont. Code Ann. § 45-6-301(1)(a), which states "A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner **and**: (a) has the purpose of depriving the owner of the property."

> Subdivision (1) (a) covers the traditional mental state required in theft. This mental state is the one which will be present in the great majority of cases. However, special situations may exist where it is difficult to prove a specific purpose to permanently deprive, but the offender's handling or disposition of the property is such that it directly results in a permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery.

Criminal Law Commission Comments, Mont. Code Ann. § 45-6-301. The offense of theft under Mont. Code Ann. § 45-6-301(1)(a) contemplates "actual taking" rather than mere possession of stolen property. *State v. LaMere*, 202 Mont. 313, 318-19, 658 P.2d 376, 379 (1983).

Parsing the statutory language of the felony offense of theft, a person acts purposely when it is that "person's conscious object to engage in that conduct or to cause that result." Mont. Code Ann. § 45-2-101(65). A person acts knowingly when that "person is aware of the person's own conduct or that the circumstance exists." A person also may act knowingly with respect to the result of conduct, where that person is "aware that it is highly probably that the result will be caused by the person's conduct." Mont. Code Ann. § 45-2-101(35). "'Obtains or exerts control' includes but is not limited to the taking, the carrying away, or the sale, conveyance, or transfer of title to, interest in, or possession of property." Mont. Code Ann. § 45-2-101(46).

And, to "deprive" means (a) to withhold the property of another: (i) permanently; (ii) for such a period as to appropriate a portion of its value; or (iii) with the purpose to restore it only upon payment of reward or other compensation; or (b) to dispose of the property of another and use or deal with the property so as to make it unlikely that the owner will recover it." Mont. Code Ann. § 45-2-101(20). A deprivation can occur in any one of four ways, according to the

statute. Proof of just one definition is sufficient for finding the crime of theft. *State v. Doyle*, 1999 MT 318, ¶ 9, 297 Mont. 270, 993 P.2d 9.

Again, as charged, in order to convict S.F. of felony theft, the State had to prove that S.F. knowingly obtained or exerted unauthorized control over the Elliot van with the purpose of depriving him of the van.

S.F. did not take the keys to the van. He did not take the van. And, he did not take the laptop. S.F. was with G.S., who actually went into the Elliot home, took the keys to the van, took the laptop, and then took the van. G.S. drove the van that night. S.F. only drove it over Kerr Dam. Given these facts, the State did not prove that S.F. actually obtained control of the van or exerted control of the van, because he did not take it, carry it away, sell it, convey it, or transfer its title. Indeed, the State did not seek to charge S.F. with felony theft by accountability. (*See* Mont. Code Ann. § 45-2-302.)

The district court found sufficient evidence to deny S.F.'s motion for a directed verdict [motion to dismiss for insufficient evidence] because there was damage to the van that exceeded $1,000; S.F. was with G.S.; and S.F. drove the van at one point. Because of those facts, the district court found that S.F. had equal responsibility for the damage caused to the van since he had, in fact, involved himself in the theft that involved the damage to the van. (Tr. at 34.)

Assuming *arguendo* that it can be said S.F. exerted control over the van by driving it, he did not act with the purpose of depriving the Elliots of the van. When he was driving the van briefly, the State did not prove S.F. was acting with the purpose to deprive the Elliots of the van. That is, because he consciously did not withhold it permanently (§ 45-2-101(20)(a)(i)); he consciously did not appropriate a portion of its value when he was driving it, as he only drove it momentarily (§ 45-2-101(20)(a)(ii)); he did not consciously ask for payment or reward for return of the van (§ 45-2-101(20)(a)(iii)); and he did not consciously dispose of the van in such a manner that would make the Elliots unlikely to recover it (§ 45-2-101(20)(b)), because he did not wreck the van. *See State v. Kelley*, 2005 MT 200, ¶¶ 21-22, 328 Mont. 187, 119 P.3d 67 (defendant actually removed the stolen property from the pet store, so the jury had conclusive evidence that he exerted unauthorized control or possession of property).

Hence, the district court erred in denying S.F.'s motion for directed verdict [motion to dismiss for insufficient evidence].

II. THE DISTRICT COURT DID NOT HAVE AUTHORITY TO REQUIRE S.F. TO PAY RESTITUTION FOR DAMAGE TO THE VAN.

At disposition, the district court sentenced S.F. to pay $3,459. 31 in restitution for damage to the van. He was jointly and severally liable with G.S. This sentence, however, is illegal. The district court did not have authority to

require S.F. to pay restitution for the damage to the van. The damage did not occur as a result of the theft of the van by S.F. The damage to the van occurred when G.S.--who took the van and drove it the majority of the night--actually drove it into a tree. During the brief timeframe that S.F. was driving the van, no damage to the van occurred.

A defendant may not be ordered to pay restitution in excess of the damages caused by his criminal conduct. *See State v. Beavers*, 2000 MT 145, ¶ 12, 300 Mont. 49, 3 P.3d 614. Just as in *State v. Breeding*, 2008 MT 162, 343 Mont. 323, 184 P.3d 313, there was no causal connection between S.F.'s brief driving of the van and the damage inflected on the van by G.S., so there is no basis for holding S.F. liable for $3,459.31 in restitution.

A. S.F. Did Not Actively Acquiesce to the Imposition of Restitution.

Generally, this Court will not review issues that the appellant failed to raise at the district court level. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892. However, there is a narrow exception to the rule; this Court will "review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 999-1000. This Court has applied the *Lenihan* exception when the district court lacks the statutory

authority to impose a sentence. *See e.g.*, *State v. Brister*, 2002 MT 13, ¶¶ 26-28, 308 Mont. 154, 41 P.3d 314.

A party waives his ability to challenge for the first time on appeal an illegal sentence when he actively acquiesced or participated in the error he now challenges on appeal. *State v. Micklon*, 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559. However, this Court has also made clear that this exception is narrowly drawn: a defendant's actions must rise to the level of "active acquiescence" in the error below before he will be found to have waived it. *State v. Eaton*, 2004 MT 283, ¶ 15, 323 Mont. 287, 99 P.3d 661; *State v. Walker*, 2007 MT 205, ¶ 15, 338 Mont. 529, 167 P.3d 879 (noting this Court "narrowed the definition of 'active acquiescence' for the purposes of invoking the *Lenihan* rule" in *Eaton*).

S.F.'s sentence requiring him to pay restitution is illegal. Counsel made the district court aware of the fact that the felony theft charge would be appealed, which in turn, would affect the fact that the district court required him to pay restitution. That statement does not rise to the level of "active acquiescence" this Court requires before it will impose the drastic result of finding a defendant has waived any objection to an illegal sentence. This is not similar to those cases where the Court has found active acquiescence to an illegal sentence, for example where a defendant himself repeatedly stated to the probation officer and the court that he wished to pay restitution and then affirmatively "used his assertion to

bargain for a lighter sentence." *Walker*, ¶ 16 (refusing to hear the defendant's challenge to an imposition of interest on installment payments where the defendant expressly requested he be allowed to make payments in installments and told the district court he would agree to an interest provision); *State v. O'Connor*, 2009 MT 222, ¶ 12, 351 Mont. 329, 212 P.3d 276 (declining to address the defendant's challenge to the legality of restitution where the defendant agreed to pay restitution as part of her plea negotiation, told her probation officer she had to pay restitution, and at sentencing objected to only the amount but not the imposition of restitution).

To the extent this Court construes counsel's argument as not having objected to the imposition of restitution, S.F. did not actively acquiesce in this illegal sentence. That is true because S.F. was not bargaining for anything and the sentence exceeds mandates that he not be required to pay for damages above his criminal conduct as controlled by this Court's decision in *Breeding*.

B. In the Alternative, This Court Must Vacate the Imposition of Restitution Because it Resulted from Ineffective Assistance of Counsel.

If this Court holds that imposition of restitution does not fall within the *Lenihan* exception, this Court can nonetheless review and reverse the imposition of restitution on the ground that its imposition resulted from counsel's ineffective assistance in not making a contemporaneous objection.

The Sixth Amendment of the United States Constitution (applicable to the State of Montana through the Fourteenth Amendment) and Article II, Section 24, of the Montana Constitution both guarantee defendants the right to effective assistance of counsel in criminal cases. This Court analyzes ineffective assistance of counsel claims using the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. To prevail on an ineffective assistance claim a defendant must demonstrate that (1) "counsel's performance was deficient or fell below an objective standard of reasonableness" and (2) "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal citations omitted).

On direct appeal, this Court reviews ineffective assistance claims only if they are record based. *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780. Generally, an ineffective assistance claim is record based if "the record fully explain[s] why counsel took the particular course of action." *State v. Fender*, 2007 MT 268, ¶ 9, 339 Mont. 395, 170 P.3d 971 (citations omitted). However, this Court has also decided ineffective assistance claims on direct appeal where there is "'no plausible justification' for counsel's conduct." *Fender*, ¶ 9 (citing *Kougl*, ¶¶ 21-22 (failure to request jury instructions); *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641 (admissions of client's guilt in opening and closing

arguments); *State v. Rose*, 1998 MT 342, ¶¶ 18, 20, 292 Mont. 350, 972 P.2d 321 (failure to request jury instructions)).

If this Court does not construe counsel's argument as an objection to imposition of restitution, the record on appeal is silent as to why counsel did not object. Yet, there could be no plausible reason not to object, where counsel argued that there was insufficient evidence to convict S.F. of felony--given that he only drove the van briefly--and at most was guilty of unauthorized use of a vehicle. Given those arguments, again, there could be no plausible reason for counsel to agree to have S.F. pay for damage to the van that he did not cause, especially in light of the law on that subject.

Failure to address this issue was deficient under the first *Strickland* prong. *See Price v. State*, 2007 MT 307, ¶ 14, 340 Mont. 109, 172 P.3d 1236 (finding deficient performance where counsel failed to raise a meritorious issue on appeal); *Woeppel v. City of Billings*, 2006 MT 283, ¶ 14, 334 Mont. 306, 146 P.3d 789 (finding that failure to perfect an appeal by filing a brief is deficient performance); *State v. Becker*, 2005 MT 75, ¶ 20, 326 Mont. 364, 110 P.3d 1 (finding that failure "to rely on the proper statutory grounds for dismissal, constitutes deficient performance"); *Kougl*, ¶¶ 20-21, 24 (finding deficient performance where counsel failed to request an accomplice testimony instruction).

With respect to the second *Strickland* prong, there is a "reasonable probability" that had S.F.'s counsel objected to the imposition of restitution under *Breeding*, the district court would have realized its error and not imposed restitution in an amount above S.F.'s criminal conduct. But for counsel's failure to object, S.F. would not be liable for damage he did not create. Paying for damage he did not create to a vehicle is prejudicial to S.F. Consequently, the denial of S.F.'s right to effective assistance of counsel warrants this Court vacating the imposition of restitution. *See Becker*, ¶ 25.

CONCLUSION

Given that the district court had no evidence that S.F. stole anything from the Elliot home--in fact, S.F.'s friend testified that S.F. did not even enter the Elliot home--this Court should reverse S.F.'s conviction of felony theft. For all of the foregoing reasons, the restitution obligation should be stricken.

Respectfully submitted this ____ day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

By: _____
JOSLYN HUNT
Chief Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MITCH YOUNG
Lake County Attorney
106 Fourth Avenue East
Polson, MT 59860

Copy mailed to S.F. Jr.

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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JOSLYN HUNT

APPENDIX